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Nos. 82-1913 and 82-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.,

Appellees.

On Appeals from the United States District Court for the Western District of Texas

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BRIEF FOR THE COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?

Whether the Tenth Amendment and constitutional principles of federalism bar the application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981), to publicly-owned mass transit systems?

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BRIEF FOR THE COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE[1]

INTEREST OF AMICUS CURIAE

The Colorado Public Employees' Retirement Association is an organization formed in 1931 to administer the payment of retirement benefits to employees of the State of Colorado and its political subdivisions. The Associa-

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[1] This brief is filed with the consent of the parties pursuant to Supreme Court Rule 36.2. The written consents have been filed with the Clerk of the Court.

tion currently administers four separate retirement trust funds for state employees, school district employees, municipal employees, and judges. Employers and employees make equal contributions to these funds. The assets of these funds currently exceed $4 billion. Membership in the Association today consists of approximately 96,000 active employees and 24,000 retired persons and their beneficiaries. The policies of the Association are determined by a Board of Trustees consisting of fifteen persons, including the Colorado State Auditor, the Colorado State Treasurer, and thirteen Trustees elected by the Association's members.

The Colorado Public Employees' Retirement Association, interested in protecting the financial viability of the funds that it administers and promoting the general welfare of its members, has taken a keen interest in federal legislation and in constitutional law developments affecting state and local employees. In recent years, the Association has been particularly interested in proposed federal legislation that would subject its members to mandatory federal Social Security coverage. Since the members already fund and enjoy the benefits of the retirement programs operated by the Association, the application of mandatory Social Security coverage would provide them with overlapping coverage at substantial additional costs. If these costs were extended by mandatory Social Security coverage to all state and local employees, the Association's retirement funds and its members would face severe cost pressures that likely would necessitate a cutback in retirement benefits and possible elimination of the existing Association retirement program.

In an effort to preserve the integrity of the Association's retirement program, and to protect the Association itself from intrusive federal legislation, the Association has sought protection under the Constitutional guarantees of state and local sovereignty contained in the Tenth Amendment. These guarantees are embodied in this

Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and have been invoked in the Association's efforts to maintain the autonomy of its retirement programs.

This Court's possible reconsideration of its *National League of Cities* decision is a matter that commands the attention of the Colorado Public Employees' Retirement Association. At stake is a half-century's tradition in which the State of Colorado and the Association have possessed the independence to fashion appropriate retirement benefits for Colorado employees. A reconsideration of *National League of Cities* may raise legal and policy considerations that extend far beyond the narrow legal issue, initially briefed by the parties, of whether the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981), may be applied to publicly-owned mass transit systems. The Association accordingly wishes to participate in this case to assure that the historic, constitutional underpinnings of the *National League of Cities* decision remain intact and that state and local governments retain the authority to develop and administer their retirement programs—essential components of the compensation packages provided to state employees—free from unwarranted federal regulation.

SUMMARY OF ARGUMENT

I. The Colorado Public Employees' Retirement Association urges this Court to reaffirm the fundamental principles of the Tenth Amendment articulated in *National League of Cities v. Usery*, 426 U.S. 833 (1976). This landmark decision rests upon the unassailable constitutional principle that Congress may not regulate state activity in a manner that would "hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union v. Long Island Railroad*

Co., 455 U.S. 678, 687 (1982) (quoting *National League of Cities*, 426 U.S. at 851). While the precise contours of the immunity enjoyed by states and their political subdivisions under the Tenth Amendment are clouded, the Amendment, at its heart, must continue to be read as a guarantee that core sovereign state functions will be protected from unwarranted Congressional interference. The *National League of Cities* decision recognizes the vitality of the Tenth Amendment and its continued applicability to the sphere of federal-state relations. It is sensitive to the balance of interests that must be struck between sovereigns in our federal system and true to the framers' vision that states must be afforded a measure of freedom to operate their own governmental programs.

II. Although *National League of Cities* and its progeny contain sweeping pronouncements about the role of states in the federal system, the actual decision is a modest one that most recently was endorsed in *EEOC v. Wyoming*, 460 U.S. 226 (1983). When stripped of its broad constitutional overtones, *National League of Cities* holds only that Congress may not exercise its Commerce power to legislate the compensation paid to employees of states and their political subdivisions. Congressional intrusion into the amount of revenues that a state may allocate to its employees is a direct assault upon a state's ability to maintain its "separate and independent existence." Indeed, a state only may act through its employees. The instant case accordingly should not be used as a vehicle for reconsidering either the Constitutional foundations of *National League of Cities* or the test that has been developed for assessing claims of state immunity from federal Commerce Clause legislation. Regardless of the ultimate limits of Tenth Amendment immunity, this case may be decided narrowly by following the rule formulated in *National League of Cities* and *EEOC v. Wyoming* that the compensation paid to state employees, including public transit workers, may not be prescribed by Congress.

III. If this Court, however, should elect to review the prevailing test for assessing claims of state immunity from federal Commerce Clause legislation, then we would agree with the Appellant Secretary of Labor that some clarification of this test is appropriate. Once it is determined that Congressional legislation is directed at "States as States," a determination easily made from the text and legislative history of the law under review, then the next inquiry should be whether the legislation interferes with an integral state function that is an indisputable attribute of state sovereignty. This inquiry ought to be conducted through a functional, rather than an historical, analysis. The critical question is whether the function or service under review (1) is reasonably necessary to carry out the political task of governing a state or (2) concerns the provision of a public good that presently cannot be provided efficiently by private enterprise. If there is to be consistent application of constitutional doctrine, Congress' Commerce Clause powers cannot be dependent upon judicial resolution of the thorny historical question of whether some or all states were the first providers of a particular function or service. In this case, the provision of transit services, or more narrowly, the payment of compensation to public transit employees, is the sort of integral state function that should not be regulated by Congress. The decision of the court below accordingly should be affirmed.

ARGUMENT

I. THE *NATIONAL LEAGUE OF CITIES* DECISION IS FIRMLY GROUNDED ON CONSTITUTIONAL HISTORY AND LEGAL DOCTRINES THAT SHOULD NOT BE RECONSIDERED.

The decision of this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976) rests upon historical and constitutional foundations that do not require reexamination. In *National League of Cities*, this Court held that state and local governments should not be compelled to ac-

cept federal minimum wage and maximum hour standards because these laws would interfere with the fundamental right of the states to shape employment relations with their employees. In reaching this conclusion, this Court did not rely on the once common, but now thoroughly discredited, ploy of attempting to limit Congressional power by defining "interstate commerce" so narrowly that employment terms escape its reach. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Instead, *National League of Cities* focused directly upon the role of federal-state relationships in the maturing Union, and reaffirmed the principles of federalism that were central to the farmers' vision of the Republic. In holding that there are core sovereign state activities and functions which are beyond the reach of the federal hand, *National League of Cities* follows both constitutional history and two centuries of decisional law.

A. *National League of Cities* is Based on the Framers' Vision of State-Federal Relations.

National League of Cities, contrary to the view of Appellant Joe G. Garcia, is not an aberrational decision which subordinates federal powers to state sovereignty. Supplemental Brief of Appellant Garcia at 5-12. Rather, it reaffirms the notion, central to federalism, that the federal government is constitutionally incapable of interfering in " 'functions essential to [the] separate and independent existence' " of states. 426 U.S. at 845 (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911)). There is no cause for this Court to accept Appellant Garcia's invitation to rewrite the constitutional history of federalism and abrogate the sovereign power of states to fashion their relationships with employees. The history of ratification of the Constitution and the Bill of Rights

clearly shows that the framers fully intended the states to have the freedom to perform essential governmental functions within their proper spheres of sovereignty.

During state debates on ratification of the Constitution, much opposition focused on the adequacy of the Constitution's protection of state autonomy. *See, e.g.*, Letter from Robert Yates and John Lansing to the Governor of New York, *reprinted in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480-483 (S. Elliott ed. 1836). The Constitution's defenders argued that such language was unnecessary, not undesirable. As Hamilton emphasized,

> . . . an attempt on the part of the national government to abridge [the states] in the exercise of [sovereignty] would be a violent assumption of power, unwarranted by any article or clause of its Constitution.
>
> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the U.S.

The Federalist No. 32, at 206-07 (A. Hamilton) (Cambridge ed. 1901).

Surely not even the most dogged denigrator of state government could for a moment contend that, in joining the Union, states granted to the national government paramount authority over state relations with their employees. Yet this extreme notion necessarily underlies the argument adopted by those who advocate a wholesale rejection of the *National League of Cities* decision.

The tone of Appellant Garcia's brief suggests that states are mere vestiges of an earlier government structure and that the framers would endorse this conception of the proper role of states in our federal system. Supplemental Brief of Appellant Garcia at 5-12. They would not. As Madison explained:

> [T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, foreign commerce . . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 303 (J. Madison) (Cambridge ed. 1901).

The framers certainly did not believe that the national government constitutionally could abridge the sovereign functions of the states.[2] This conclusion is "clearly admitted by the whole tenor of the instrument which contains the articles of the . . . Constitution." The Federalist No. 32, at 197 (A. Hamilton) (Cambridge ed. 1901). The first Congress deliberately emphasized the principle that the states did not cede all sovereign powers upon joining the Union by proposing the Tenth Amendment, which provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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[2] To the contrary, the greater fear was that the states would be too strong under the Constitution. *See, e.g.*, The Federalist Nos. 17 (A. Hamilton), 31 (A. Hamilton), 46 (J. Madison) (Cambridge eds. 1901). It was also argued that, in certain respects, the state governments would be strengthened by adoption of the Constitution. *See* The Federalist No. 21 (A. Hamilton) (Cambridge ed. 1901).

When the Amendment was considered by Congress, debate centered on whether the national government should be limited to powers "expressly" delegated to it. Madison successfully argued that Congress, and by extension the Union, would be impotent without also possessing powers implied from those delegated. 1 ANNALS OF CONG. 761 (1789). But neither he nor any other believed that such powers could be used to abrogate state existence. *See id.* at 436, 767-68.

Indeed, the Amendment was thought to have precisely the opposite effect. When ratification was debated by the states, no less a Federalist than John Adams argued that the Amendment was an "assurance that, if any law made by the federal government shall be extended beyond the power granted by the . . . Constitution, and inconsistent with the constitutions of [the] state[s], it will be an error, and adjudged by the courts of law to be void." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 131 (S. Elliott ed. 1836). Hence even passionate advocates of federal power believed the Amendment was a device for limiting federal overreaching and ensuring preservation of state autonomy.

As in debates over ratifying the Constitution, critics of the Tenth Amendment contended that explicit protection of state sovereignty was unnecessary. Such statements must be viewed in their context as one element of an argument that the Bill of Rights as a whole was unnecessary. That these were minority views is conclusively proved by the subsequent adoption of the Tenth Amendment and the other guarantees of the Bill of Rights.

History demonstrates the framers' fidelity to the ideas of states as largely independent sovereigns within the context of a federal union. Not for a moment did the framers believe or desire that the national government

could usurp state functions or drain state authority. That the states might not be free to structure the essential components of their employment relationships as they saw fit simply did not enter into the framers' calculus.

B. The *National League of Cities* Decision is Founded on Long-Standing Legal Precedent.

The principles of federalism underlying the Court's interpretation of the Tenth Amendment in *National League of Cities* are firmly rooted in a long line of decisions addressing the respective powers of states and the federal government. Federal powers, however broad, were initially recognized by the Court as limited to those delegated. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Subsequent decisions of this Court have demonstrated a concern transcending time and politics that state authority not be undercut. *See, e.g., Coyle v. Oklahoma*, 221 U.S. 559 (1911) (location of state capital is outside the scope of Congressional powers); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) (Supreme Court will not review state court judgment that rests on adequate and independent state law grounds); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) ("Erie doctrine"). This Court's concern with the sovereign state functions protected by the Constitution was succinctly summarized in *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975), where the Court observed that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise powers in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *See generally Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1965 (1977).

With the possible exception of *Maryland v. Wirtz*, 392 U.S. 183 (1968), which *National League of Cities* overruled, this Court has never countenanced expansive federal intrusion into state affairs. It continuously has said that each state is "endowed with all the functions essential to separate and independent existence." *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869). *Lane County* was decided in the middle of Reconstruction. It might have been reasonable, even natural, for this Court to respond to the trauma of civil war and rebirth of the Union by denying the existence of any independent authority in state governments. Remaining faithful to the framers' vision, the Court instead reiterated that states are indeed able to exercise a free hand in their proper spheres of activity.

Those spheres, of course, are not plenary; "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." *United States v. California*, 297 U.S. 175, 184 (1936). Consistent with this principle, the *National League of Cities* decision was not meant to outlaw federal power in areas of overwhelming national interest. 426 U.S. at 856 (Blackmun., J., concurring). Nor has it been interpreted to prohibit the national government from exercising its legitimate Commerce Clause powers to regulate interstate commerce. *See, e.g., FERC v. Mississippi*, 456 U.S. 742 (1982) (Public Utility Regulatory Policies Act held to be a legitimate use of the commerce power). What *National League of Cities* emphasizes is that, in order to protect the "indestructible union, composed of indestructible states," *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869), "under most circumstances federal power to regulate commerce [may] not be exercised in such a manner as to undermine the role of the states in our federal system." *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 686 (1982).

This Court found the 1974 amendments to the Fair Labor Standards Act at issue in *National League of Cities* violative of just such a principle. Attempting to demarcate the bounds beyond which the federal government may not intrude, this Court recognized the severely limited power of Congress to regulate "functions essential to the separate and independent existence of the state," 426 U.S. at 851, and "undoubted attribute[s] of state sovereignty." 426 U.S. at 845.

The outer boundaries of this protected turf may be elusive. But whatever this protected area may be, the only way a state can act within it is through its employees. The federal hand must be stayed from undue interference with state employer-employee relationships, else it will act upon the very heart of *all* sovereign functions of the state. To decide otherwise, and to reject the historical and doctrinal underpinnings of *National League of Cities*, as urged by Appellant Garcia, would indeed be to permit "the National Government [to] devour the essentials of state sovereignty. . . ." *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

C. The Doctrine of Intergovernmental Tax Immunities Reaffirms the Principles of State Sovereignty Endorsed in *National League of Cities*.

Concern with federalism, and the relative autonomy of the state employer-employee relationship, is not expressed only in the context of the Tenth Amendment. One of its earliest manifestations is the doctrine of intergovernmental tax immunities. Since the early nineteenth century, this Court has recognized that the federal scheme embodied in the Constitution implicitly limits the power of a state or the federal government to tax the other or its instrumentalities. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). This necessary consequence of the

separate sovereignties of states and the national government arises because, as Chief Justice Marshall stated, "the power to tax involves the power to destroy." *Id.* at 431. Taxation implies interference and the establishment of governmental priorities, neither of which one level of government may do for another. As such, each level of government is immune from taxation by the other. *See South Carolina v. Regan*, —— U.S. ——, 104 S. Ct. 1107 (1984); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 157-58 (1911); *Ambrosini v. United States*, 187 U.S. 1 (1902); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 585-86 (1895); *United States v. Railroad Co.*, 84 U.S. (17 Wall.) 322 (1873); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871).

To be sure, the perimeter of this doctrine has varied over the years as a necessary accompaniment to other developments in the law. But examination of this evolution conclusively proves that Appellant Garcia errs in asserting that the doctrine, and the support it provides for this Court's decision in *National League of Cities*, is largely vestigial. Supplemental Brief of Appellant Garcia at 22-30.

This Court first extended intergovernmental immunity to the states in a seminal holding that the taxing power of the federal government necessarily is restricted when used to tax state instrumentalities. *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871).[3] A half-century later, this

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[3] Writing for the Court, Justice Nelson relied upon the principles adumbrated in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), as well as the "familiar rule(s)" of federalism:

> [I]n many articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized . . . . Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution . . . it would seem to follow as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserv-

principle was reaffirmed in *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926). While exempting independent contractors of state governments from the general extension of state immunity from federal tax, this Court in *Mitchell* emphasized that "those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other." *Id.* at 522.

Subsequent decisions have not eroded the basic tenet that federal taxation power may not debilitate state sovereignty. *New York v. United States*, 326 U.S. 572 (1946) is the only case that at first blush seems to reject the intergovernmental tax immunity doctrine, but even a cursory analysis indicates that *New York* does not abandon it. That case drew four opinions from the eight Justices who took part in it. Although six Justices agreed that the State of New York was not exempt from a federal tax on sales of bottled water, "all agree[d] that not all of the former [tax] immunity is gone." *Id.* at 584. (Rutledge, J., concurring). Even Justice Frankfurter's opinion, which was the most disparaging of the immunity doctrine, had no quarrel with limiting the doctrine to matters more relevant to the task of governing; what he objected to was its extension to such "irrelevancies" as bottled water. *Id.* at 581.[4]..

> ing their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax.

Collector v. Day, 78 U.S. (11 Wall.) 113, 125-26 (1871).

[4] Justice Stone's concurrence, which, joined by three Justices, attracted the most support, specifically limited the holding of the case before it. He stressed that the Court was

> . . . not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike . . . .

Admittedly, the scope of the intergovernmental tax immunity doctrine has been narrowed over the years. State employees are no longer exempt from federal income tax. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871). Similarly, many state-operated activities unrelated or only tangentially related to the task of governing are now subject to federal law. *See, e.g., Massachusetts v. United States*, 435 U.S. 444 (1978) (user fees); *United States v. California*, 297 U.S. 175 (1936) (railroads). Such changes do not, however, transform this vital doctrine into a lifeless one.

This Court resolutely has refused all opportunities to declare the doctrine no longer valid. *Massachusetts v. United States*, 435 U.S. 444, 454 (1978); *Fry v. United States*, 421 U.S. 542 (1975). This doctrine offers useful parallels to the question of the validity of federal preemption of state employee compensation policies, particularly when few such policies could be such an essential attribute of a state's sovereignty as the wages paid to the state's employees. Like the Tenth Amendment limitations on federal interference in state employment relationships, the intergovernmental tax immunity doctrine is a method of preserving state sovereignty over matters peculiarly the preserve of an autonomous governmental body. The doctrine stands as a firm constitutional basis for this Court's decision in *National League of Cities* and its recognition of the autonomy conferred upon states.

> It is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State . . . [t]he tax, even though non-discriminatory, may be regarded as infringing [state] sovereignty. (citation omitted)

New York v. United States, 326 U.S. 572, 586-87 (1945). Indeed, when combined with Justices Douglas and Black's vigorous dissent supporting complete state independence from federal taxation, *New York* provides a solid majority behind the intergovernmental tax immunity doctrine.

II. THE *NATIONAL LEAGUE OF CITIES* DECISION SHOULD BE REAFFIRMED AT LEAST INSOFAR AS IT RESOLVES THE NARROW ISSUE OF WHETHER FEDERAL LEGISLATION MAY PRESCRIBE THE COMPENSATION TO BE PAID STATE EMPLOYEES.

The Colorado Public Employees' Retirement Association respectfully submits that this case does not present an appropriate factual setting for defining the precise contours of the Tenth Amendment immunity enjoyed by states and their political subdivisions. In its recent decisions in *EEOC v. Wyoming*, 460 U.S. 226 (1983), *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678 (1982), *FERC v. Mississippi*, 456 U.S. 742 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), this Court already has signalled that its earlier decision in *National League of Cities* cannot be read to afford states and municipalities a broad shield under the Tenth Amendment from all forms of federal legislation that may affect their governmental activities. Although these decisions suggest that the scope of its protection may be limited, the Tenth Amendment has not been read out of the Constitution.

The terms of the Tenth Amendment guarantee that States will remain free to enjoy the essential attributes of their sovereignty. The *National League of Cities* decision dealt directly with only one of these attributes: the right to determine the compensation paid to its employees and fix the hours that will be worked by its employees. In language of limited applicability to most other cases implicating the Tenth Amendment, the Court reasoned that:

> One undoubted attribute of state sovereignty is the States' *power to determine the wages* which shall be paid to those whom they employ in order to carry out their governmental functions, *what hours those persons will work, and what compensation will be*

> *provided where these employees may be called upon to work overtime.* The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence," [case citation omitted], so that Congress may not abrogate the States' otherwise plenary authority to make them. (emphasis added)

426 U.S. at 845-46.

The decision in *National League of Cities*, if read most narrowly, stands for the modest proposition that the compensation paid by a state to its employees cannot be determined by Congressional legislation. Congress thus cannot fix the compensation to be paid *any* state employees, be they public transit workers, elected officials, or the administrative personnel who staff state agencies. The "power to determine the wages . . . hours and compensation" is a "function" that the Court in *National League of Cities* found to be "essential to [the] separate and independent existence" of states. "Congress may not abrogate the States' otherwise plenary authority to "exercise this power. 426 U.S. at 846.

This limited reading of the *National League of Cities* decision was endorsed in this Court's recent decision in *EEOC v. Wyoming*, 460 U.S. 226 (1983). There this Court held that federally imposed state compliance with the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981), was not violative of Wyoming's Tenth Amendment rights. In reaching this decision, the Court carefully distinguished, and reaffirmed, its earlier holding in *National League of Cities.* Writing for the Court, Justice Brennan stated:

> A State's employment relationship with its workers can, under certain circumstances, be one vehicle for the exercise of its core sovereign functions. In *National League of Cities*, for example, the power to determine the wages of government workers was

> tied, among other things, to the exercise of the States' public welfare interest in providing jobs to persons who would otherwise be unemployed, 426 U.S. at 848. Moreover, *some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment.* See *id.*, at 850 (relating power to determine hours of government workers to unimpeded exercise of State's role as provider of emergency services). See generally *id.*, at 851 (stressing importance of state autonomy as to "*those* fundamental employment decisions *upon which their systems for performance of* [their dual functions of administering the public law and furnishing public services] *must rest*"). (emphasis added)

460 U.S. at 238 n. 11.

The right to fix the compensation paid to state employees was recognized in the majority opinion to be one of the "fundamental employment decisions" needed for the state to exercise its "core sovereign functions." This same view would appear to be shared by the four Justices who dissented from the majority opinion. The dissent found that Congress lacked the power to "dictate to the states, and their political subdivisions, detailed standards governing the selection of state employees" and therefore could not apply the Age Discrimination in Employment Act to the states. 460 U.S. at 251 (Burger, C.J., dissenting). Consequently, in the Court's most recent interpretation of the protections given states by the Tenth Amendment, all of the members of the Court appeared to endorse the narrow proposition, advocated here by the Colorado Public Employees' Retirement Association, that Congress may not intrude into state sovereignty by dictating the compensation to be paid to state employees.

The same concerns that were highlighted by the Court in *EEOC v. Wyoming* and used to distinguish the earlier *National League of Cities* decision are before the Court

again in the instant appeal. The Court in *EEOC v. Wyoming* reasoned that federal preemption of the Wyoming statute specifying the retirement age for game wardens raised a completely different set of sovereign concerns from those presented in *National League of Cities*. There "application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." 460 U.S. at 240. Two "consequential effects" were identified as being not present in *EEOC v. Wyoming*, but present in *National League of Cities*. Both are present here. First, in both *National League of Cities* and in this case, states are being forced to abide by wage and overtime restrictions that may leave them with less managerial flexibility and less money for other vital state programs. Although the record here indicates that transit workers, as a group, receive wages in excess of the federal minimum wage,[5] there may be particular jurisdictions which wish to preserve the option of compensating their transit employees at less than the prevailing federal minimum wage should economic conditions and other compelling local needs doctate a change in compensation policy. Even though public transit workers, because of their relatively high hourly wages, will rarely, if ever, be directly affected by any minimum wage requirement, they surely will be affected by application of the overtime provisions of the Fair Labor Standards Act. These requirements would intrude unduly upon the powers of state and local governments to choose how to structure routes, employee work hours, service schedules, record keeping and aggregate employee compensation. The loss of freedom to allocate resources such as the compensation paid public employees, including public transit employees,

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[5] *See, e.g.*, U.S. DEPARTMENT OF LABOR, UNION WAGES AND BENEFITS: LOCAL TRANSIT OPERATING EMPLOYEES, Table 2 at 4 (1981). *See also* AMALGATED TRANSIT UNION, RESEARCH DEPARTMENT BULLETIN 5 (Nov. 1983).

when necessary to fund other vital state programs is precisely the sort of encroachment upon state sovereignty that was repudiated in both *National League of Cities* and *EEOC v. Wyoming*.

Second, in both *National League of Cities* and in this case, the States wished to preserve their "ability to use their employment relationship with their citizens as a tool for pursuing social and economic policies beyond their immediate social and goals. See, *e.g.*, 426 U.S., at 848 (offering jobs at below the minimum wage to persons who do not possess minimum employment requirements')." *EEOC v. Wyoming*, 460 U.S. at 242. Regardless of whether transit employees are paid in excess of the minimum wage, states and their political subdivisions, from time to time, may need to respond to local economic crises by offering to employ their citizens at less than the federal minimum wage. Whether acting as the employer of last resort to ameliorate the hardships of unemployment or simply choosing the legitimate policy goal of maximizing employment, states should not be encumbered by the Fair Labor Standards Act in their ability to fashion employment policies.[6]

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[6] It should be remembered that the *National League of Cities* decision analyzed only federal Commerce Clause legislation. *National League of Cities* expressly left open the question "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power . . . or § 5 of the Fourteenth Amendment." National League of Cities v. Usery, 426 U.S. 833, 852 n.17 (1976). The Court has reaffirmed in recent cases that "when properly exercising its power under the § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers." EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983). *See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287 n.28 (1981); City of Rome v. United States, 446 U.S. 156, 179 (1980). However, the federal minimum wage and maximum hour legislation at issue in this case cannot be jusitfied as an exercise of these other constitutional powers.

The authority to fix the wages paid to state employees, whether they are employed as transit workers or in some other capacity, is both an essential attribute of state sovereignty and an integral state function that may not be regulated by Congress. The weighty Tenth Amendment and federalism issues that have been attached to this case can be reserved for decision at a later time. The only question that truly must be resolved now is the limited one of whether *National League of Cities* should be reaffirmed insofar as it holds that Congress may not use its Commerce Clause powers to prescribe the compensation paid to state employees. The answer to this narrow question is "yes."[7]

III. THE PAYMENT OF COMPENSATION TO PUBLIC TRANSPORTATION WORKERS IS A CORE SOVEREIGN STATE FUNCTION THAT MAY NOT BE REGULATED BY CONGRESS.

The Colorado Public Employees' Retirement Association endorses the argument, fully articulated by Appellees San Antonio Metropolitan Transit Authority and The American Public Transit Association, that the provision of publicly-owned local mass transit is a state and local

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[7] The Colorado Public Employees' Retiremert Association numbers among its members thousands of employees who are engaged in occupations specifically identified in *National League of Cities* as integral operations in areas of traditional governmental functions: fire and police protection, sanitation, parks and recreation, public health, schools and hospitals. National League of Cities v. Usery, 426 U.S. 833, 851 (1976). The immunity of these employees from Congressional attempts to regulate compensation should continue, even if this Court should find that some characteristics of the public transportation field make it appropriate to subject workers in this field to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981). Consequently, the vitality of the *National League of Cities* decision should be preserved at least insofar as these occupations are concerned, regardless of whether the Tenth Amendment and constitutional principles of federalism might permit the application of the minimum wage and overtime provisions of the Act to publicly-owned mass transit systems.

governmental function that is integral to the sovereign responsibilities of states and their political subdivisions. It is among the types of activities that the *National League of Cities* decision sought to shield from the application of the Fair Labor Standards Act. The Colorado Public Employees' Retirement Association does not wish to repeat this argument. Rather, the Association additionally argues that the provision of compensation to public employees—apart from the particular services performed by these employees—ought to be classified as the sort of state governmental "function" that survives judicial scrutiny under the test formulated by this Court in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). There the rule of *National League of Cities* was summarized as follows:

> [I]n order to succeed, a claim that Congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *Id.* at 845. Third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

452 U.S. at 287-88.

There also is a general balancing analyis to be conducted in cases where these three requirements are met. Commerce power legislation still may be applied to regulate state activities if justified by compelling federal interests that outweigh the interests of states. 452 U.S. at 288 n.29. The *Hodel* formulation of the *National League of Cities* holding has been endorsed and applied in recent decisions of this Court. *See EEOC v. Wyoming*, 460 U.S. 226, 237-39 (1983); *United Transportation Union v.*

Long Island Railroad Co., 455 U.S. 678, 684 and n.9 (1982).

The Appellant Secretary of Labor, in his Supplemental Brief, argues that some clarification of the *Hodel* test may be appropriate. Supplemental Brief of Appellant Secretary of Labor at 2, 11. The Colorado Public Employees' Retirement Association disputes the need in this case to undertake an extensive analysis of this test because the compensation paid to state employees plainly is a core sovereign function beyond the reach of Commerce power legislation. However, the Association agrees that if this test is applied, it should be clarified—though not in the manner suggested by the Secretary.

Our principal point of disagreement with the Secretary is over the interpretation of the third prong of this test: whether states' compliance with the federal law "would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (quoting *National League of Cities*, 426 U.S. at 852). The Secretary argues that this prong of the test should involve an analysis of whether the particular activity being regulated *historically* has been performed by the state. We instead argue that the Court should adopt a functional, rather than an historical, analysis which focuses upon the relationship between the particular function at issue and the political task of governing.

The first prong of the *Hodel* test specifies that only the federal regulation of "States as States" is prohibited by the federal government. This encompasses activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), but reserves as appropriate targets of federal legislation all conduct by private parties affecting inter-

state commerce. *See, e.g., United States v. Darby*, 312 U.S. 100 (1941).[8]

The first prong of the *Hodel* test is relatively uncontroversial and easily applied. It recognizes that only state, and not private, conduct enjoys protection under the Tenth Amendment. In this case, there is no dispute that the first prong is satisfied because the Fair Labor Standards Act, 29 U.S.C. §§ 201-210 (1976 & Supp. V 1981), by its express terms, would regulate the wages paid by States to their own employees, including public transportation employees.[9]

The second prong of the *Hodel* test, that the federal statute must address matters that are indisputably attributes of state sovereignty, is more problematic than the first. At least at first blush, this requirement appears to overlap with the third prong of the test, which requires that the federal regulation impair the state's ability to structure integral operations in areas of traditional state functions. The Colorado Public Employees' Retirement Association agrees with the Secretary that the inquiry suggested by the second prong is largely subsumed within the inquiry to be taken under the third prong of the *Hodel* test. Supplemental Brief of the Appellant Secretary of Labor at 12-13. It is difficult to imagine federal

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[8] Federal power to preempt state laws regulating private commerce is well established under the Supremacy Clause of the Constitution and not contested by the parties. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977); Hines v. Davidowitz, 312 U.S. 52 (1941).

[9] The immunity of the states has been limited by this Court and lower courts when the state is acting as a market participant. *See, e.g.*, New York v. United States, 326 U.S. 572 (1946) (selling bottled water as a market participant is not a sovereign activity that invokes the protection of the intergovernmental tax immunities doctrine); Public Service Co. v. FERC, 587 F.2d 716 (5th Cir. 1979) (state production of oil and gas is not protected by immunity from federal regulation). While this consideration is not present in the instant case, the distinction made between "states as states" and "states as market participants" is an indication of the relatively narrow scope of the *National League of Cities* decision.

legislation that could interfere with the integral or traditional operation of state functions, yet *not* regulate an indispensable attribute of state sovereignty. Conversely, any legislation that regulates a matter that is an indisputable attribute of state sovereignty necessarily must interfere with an integral state function. The Colorado Public Employees' Retirement Association accordingly suggests that no violence would be done to the holding and constitutional origins of *National League of Cities* if the second and third prongs of the *Hodel* test were merged.

The third prong of the *Hodel* test, whether standing alone or merged with the second prong, is at once the most enigmatic and the most important. This requirement has been interpreted in a variety of ways, none of which is completely satisfactory.

The Secretary and others have argued that the cryptic phrase—"integral operations in areas of traditional governmental functions"—should be read to mean that there are certain *historical* functions that states may not regulate with a free hand because they were not first on the scene. *See, e.g.*, Supplemental Brief of the Appellant Secretary of Labor at 17-23; Alfange, *Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming*, 1983 S. Ct. Rev. 215. This historical approach already has been rejected by this Court in *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678 (1982), where it wrote that its emphasis in *National League of Cities*

> on traditional governmental functions and traditional aspects of state sovereignty [was] not meant to impose a static historical view of state functions generally immune from federal regulation.

455 U.S. at 686-87.

Any form of historical, or "who got there first," approach is likely to result in chaos when courts are confronted with the immunity claims of states that have different histories of providing particular services or

performing particular functions. A service provided first in one state may have been provided first by a private party in another state. No single judicial application of this historic test could apply uniformly to all states. Rather, courts would be required to analyze each state function within the context of each state's unique political history. This arbitrary approach, moreover, would freeze our federal system in the structures of the past and leave little room for the states to serve as "laborator[ies]" for the dynamic exploration of new governing techniques. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. State*, 447 U.S. 429, 441 (1980); Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity From Commerce Clause Regulation*, ARIZ. ST. L.J. 35, 73-75 (1977).[10]

The Colorado Public Employees' Retirement Association submits that the determination of whether federal legislation violates the Tenth Amendment should depend upon the function under review and the relationship of that function to the political task of governing.[11] Func-

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[10] What is an integral state function must be viewed in terms of the evolving role that states play to improve the welfare of their citizens. As Justice Black remarked in his concurring opinion in Helvering v. Gerhardt, 304 U.S. 405, 427 (1938):

> [T]here cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental . . . [T]he people—acting . . . through their elected representatives—have the power to determine as conditions demand, what services the public welfare requires.

See also Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978); Sailors v. Board of Education, 387 U.S. 105, 110-11 (1967). State and local governments should not lose their constitutional immunities when they must alter their activities to meet the changing needs of their citizens.

[11] The adoption of a functional, rather than an historical approach, for assessing state claims of immunity from federal legisla-

tions that concern the provision of a public good that cannot be provided efficiently by private enterprise, under this test, would be integral to the task of governing and beyond the reach of Congress' Commerce Clause legislation.

The Sixth Circuit Court of Appeals' decision in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (1979), formulated a test for determining the presence of an "integral state function" akin to the test suggested here. The *Amersbach* test lists four criteria to be reviewed for deciding whether the state government should be immune from federal regulation:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense;
>
> (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain;
>
> (3) government is the principal provider of the service or activity; and
>
> (4) government is particularly suited to provide the service or perform the activities because of a communitywide need for the service or activity.

598 F.2d at 1037.[12]

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tion seems to be countenanced by this Court's decision in *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983), which states:

> The principle of immunity articulated in *National League of Cities* is a *functional* doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which states enjoy a "separate and independent existence," not be lost through undue federal interference in certain core state functions. (emphasis added)

[12] At least two other courts have adopted the *Amersbach* test and its functional analysis. *See* Molina-Estrada v. Puerto Rico Highway

One important feature of this test—not present in an historic test—is that it applies to state functions, such as the payment of compensation to state employees, as well as to state services, such as mass transit services. Both the *Ambersbach* test and the more abbreviated version of this test proffered here—whether the function or service is integral to the political task of governing—would assure greater predictability in the affairs of individual states. Under an "historic" test, a court or a state cannot determine which areas of regulation may be preempted by federal legislation unless it surveys the historic experience of forty-nine other states. By contrast, the *Amersbach* formulation provides states with a much higher degree of certainty about the fields of regulation they may enter free from federal interference. Greater certainty, of course, would lessen the frequency of conflicts betwen state and federal laws and reduce the litigation burdens on courts asked to decide state immunity claims.

The suggested modification of the *Hodel* test proposed here is supported by the Court's opinions in *National League of Cities* and *Long Island Railroad.* The Court has observed that the "emphasis on traditional government functions and traditional aspects of state sovereignty" in *National League of Cities* was "meant to require an inquiry into whether federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 686-87 (1982) (quoting *National League of Cities*, 426 U.S. at 851). The Court's focus upon "basic state prerogatives" encompasses more than simply the various types of activities historically

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Authority, 680 F.2d 841 (1st Cir. 1982); Woods v. Holmes & Structures of Pittsburg, Kansas, Inc., 489 F.Supp. 1296 (D. Kan. 1980).

undertaken by a state government. It also necessarily includes the functions and relationships, such as the employer-employee relationship, that are pieces of the machinery which run state governments. Both the machinery of state government and the activities which are driven by this machinery are in need of, and deserve, protection from overreaching federal interference. A narrow historical approach, such as that advocated by the Secretary, focusing only upon the historical origins of particular activities, would not guarantee the needed protection.[13]

If the right to fix the compensation paid to state employees is viewed as the "integral state function" that is to be scrutinized under the *Hodel* test, (whether applied in its original formula or as modified in the manner suggested above), the provisions of the Fair Labor Standards Act at issue here plainly cannot pass constitutional muster. States cannot effectively manage their

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[13] The decision in United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982) does not intimate either that only "activities" and not "relationships," such as that between employer and employee, fall under the umbrella of protection afforded by the Tenth Amendment, or that Congress is free to regulate the compensation paid by a state to some classes of its employees. The Court explained that in *National League of Cities* it "held that Congress could not impose the requirements of the Fair Labor Standards Act on state and local governments." United Transportation Union v. Long Island Railroad Co., 455 U.S. at 683. This statement of the holding in *National League of Cities* does not distinguish between public transit workers and other types of state employees or suggest that Congress may prescribe the compensation of some state employees but not others. Rather, the *Long Island Railroad* decision dealt only with the narrow issue of whether the collective bargaining provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1976) may be applied to state-owned passenger railroads. In a narraw holding that addressed the unique characteristics of the federal rail system, the Court emphasized the paramount federal role in fashioning "a uniform regulatory scheme" for the national rail system and the need for "federal regulation of railroad labor relations . . . to prevent disruption in vital rail service essential to the national economy." 455 U.S. at 688.

workforce, the agents through which they act, unless they are free to decide how much their employees, individually and collectively, are to be paid and what hours they are to work. Few relationships are so integral to the task of governing a state as that between the state and its employees; and few aspects of this relationship are more fundamental than the wages to be paid from employer to employee and the hours of service expected of the employee. The ability of states to act through their employees, to allocate their resources to personnel and programs, and to attain employment and welfare goals are all inextricably bound up with the freedom of states to fix compensation for their employees. No countervailing federal interest can justify Congressional intrusion into this sphere of legitimate state authority.

CONCLUSION

This Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) is true to the vision of federalism embraced by the framers of the Constitution and embodied in numerous decisions handed down by this Court. Its limited holding, that Congress may not exercise its Commerce Clause power to prescribe the compensation to be paid state employees, is correct and requires affirmance of the decision below.

Respectfuly submitted,

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